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No. 00-1661

In the

Supreme Court of the United States

ORGANIZATION FOR COMPETITIVE MARKETS, INC.,
Petitioner,

v.

SEABOARD FARMS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE; AND BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN SOCIETY OF NEWSPAPER EDITORS, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION AND SOCIETY OF PROFESSIONAL JOURNALISTS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, AND THE SOCIETY OF PROFESSIONAL JOURNALISTS

Pursuant to Supreme Court Rule 37.2(b), *amici curiae* move the Court to allow them to file their brief in support of the petitioners, which follows this motion.

Petitioner, Organization for Competitive Markets, Inc., has consented to the filing of the attached brief. Respondent, Seaboard Farms, Inc., did not consent to the filing of the attached brief.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The American Society of Newspaper Editors is a professional organization of more than 900 persons who hold positions as directing editors of daily newspapers in the United States and Canada.

The Radio-Television News Directors Association is the world's largest professional organization devoted exclusively to electronic journalism. Formed in 1946, RTNDA's membership encompasses more than 3000 news directors, news associates, educators, and students in more than 30 countries. From its inception, RTNDA has encouraged excellence in electronic journalism.

The Society of Professional Journalists is a voluntary nonprofit journalism organization representing every branch and rank of print and broadcast journalism. SPJ is the largest membership organization for journalists in the world, and for more than 90 years, SPJ has been dedicated to encouraging a climate in which journalism can be practiced freely, fully, and in the public interest.

Amici curiae, collectively, are journalists who often rely on access to court documents to report on matters of public concern. This case concerns an issue critical to the media specifically and the public in general: whether a court may cut off public access to court documents and deny an interested person the ability to challenge such a sealing order.

There is an underlying assumption in this case that the Petitioner would have some presumptive right of access to the documents at issue. However, the trial court restricted access to those documents for procedural reasons, concluding that Petitioner should not be permitted to intervene for the limited purpose of challenging a sealing order because Petitioner's interest had no fact or issue in common with the main action. The trial court ignored decades of court rulings suggesting that intervention was the appropriate procedure to challenge a sealing order, regardless of the content of the underlying suit. The court thereby effectively cut off the presumed right of access to court records and left Petitioner with no satisfactory method to challenge the sealing order. Such an outcome seems to infringe on the constitutional principles previously established by the courts.

If the Eighth Circuit decision is allowed to stand, members of the public could be denied access to court records (or court proceedings in the case of closure orders) and also be denied any procedure to seek a remedy. Such a

result is undesirable as a matter of policy and is in conflict with prior opinions of this Court requiring notice and an opportunity to be heard in cases where courts wish to limit access to court proceedings.

Given the broad ramifications of a decision in this area for First Amendment interests, *amici curiae* respectfully request that this Court grant it leave to file the attached brief.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

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The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the

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[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amici curiae* declare that they authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief. Because Respondent did not consent in writing to the filing of this brief, a motion for leave to file precedes this section.

next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

The present case raises important issues regarding how the public may enforce its presumptive right of access to court documents. The trial court in the underlying lawsuit has refused to let Petitioner intervene for the limited purpose of challenging a sealing order, leaving Petitioner with no satisfactory method of enforcing its presumptive right of access. Such a ruling undermines the important policies set forth by this Court in granting the public a right of access to court proceedings and documents. It is therefore imperative that this Court clarify the procedural means by which a member of the public may enforce his or her presumptive right of access to court proceedings and documents. *Amici* respectfully request that, in clarifying those procedures, this Court establish a clear rule allowing intervention in all cases for the limited purpose of challenging a sealing or closure order.

SUMMARY OF THE ARGUMENT

This Court has clearly established a presumptive right of access to criminal proceedings. Most courts have relied on such opinions of this Court to logically conclude that there is a corresponding presumptive right of access to civil proceedings and to court records on file with the clerk in any court case.

Although a court may limit access to proceedings or documents in unusual cases, courts have understood that they must consider First Amendment issues and meet rigorous constitutional standards before access is restricted. Courts have also understood that members of the public or press may intervene in any case for the limited purpose of challenging an order closing a courtroom or sealing court records. Following

prior rulings of this Court that require courts to provide the public with notice and an opportunity to be heard before limiting access to criminal proceedings, most courts agree that intervention is the best procedure for a member of the public to challenge a closure order because it provides an opportunity for the court to comply with the constitutional requirements presumed to apply.

In this case, the Eighth Circuit denied a citizen's request to intervene in a civil case for the limited purpose of challenging a sealing order, reasoning that the purported intervenor's interest had no fact or issue in common with the main action. Such ruling effectively denies the public the ability to challenge sealing orders and thereby eviscerates the presumptive right of access to court proceedings and documents, which can only be restricted after the court has provided the members of the public with notice and an opportunity to be heard on the question of their exclusion.

The right of access is meaningless if there is no mechanism for exercising that right.

ARGUMENT

I. Intervention for the limited purpose of challenging sealing orders should always be permitted to preserve the presumptive right of access to court proceedings and documents.

A. There is a well-established right of access to court proceedings and documents.

The public has a well-established right of access to criminal proceedings, and the United States Supreme Court has consistently affirmed that right. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (finding a public right of access to criminal trials); *Globe Newspaper Co. v.*

Superior Court, 457 U.S. 596 (1982) (holding that statute mandating closure of courtrooms during minor victims' testimony was unconstitutional); *Press Enterprise Co. v. Superior Court (Press Enterprise I)*, 464 U.S. 501 (1984) (reversing California state court's closure of voir dire); *Waller v. Georgia*, 467 U.S. 39 (1984) (finding closure of criminal suppression hearing to be overbroad and unconstitutional); *Press Enterprise Co. v. Superior Court (Press Enterprise II)*, 478 U.S. 1 (1986) (finding qualified right of access to pretrial hearings, and noting that First Amendment scrutiny must be applied); and *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147 (1993) (closure of preliminary hearing was unconstitutional).

Other courts have uniformly applied those principles to grant the public a presumptive right of access to civil proceedings. *Publicker Industries, Inc. v. Cohen*, 733 F.2d1059 (3d Cir. 1984); *Westmoreland v. CBS, Inc.*, 752 F.2d 16 (2d Cir. 1984); *In re Iowa Freedom of Information Council*, 724 F.2d 658 (8th Cir. 1984); *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983); *Del Papa v. Steffen*, 915 P.2d 245 (Nev. 1996); *State v. Cottman Transmission*, 542 A.2d 859 (Md. App. 1988). As this Court has noted, "in some civil cases the public interest in access . . . may be as strong as, or stronger than, in most criminal cases." *Gannett Co. v. DePasquale*, 443 U.S. 368, 387 n.15 (1979).

Courts have also recognized that public access to court records, such as pleadings and evidence, is equally important and should be presumed. *See, e.g., Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1179 (6th Cir. 1983) (documents filed in civil litigation should be open because secrecy insulates the participants, masks impropriety, obscures incompetence, and conceals corruption); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249 (4th Cir. 1988) (pleadings and evidentiary documents should be open);

Matter of Continental Illinois Securities Litigation, 732 F.2d 1302 (7th Cir. 1984) (records should be open); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893 (7th Cir.1994) (assuming both a First Amendment and a common law right of access to civil litigation documents).

If the public has a presumptive right of access to court proceedings and documents, then there must be some procedural means for preserving that right.

B. Intervention is the best method of preserving the public right of access to court proceedings and documents.

Courts have noted only three possible methods for challenging such orders: (1) intervention in the case to which the citizen seeks access for the limited purpose of challenging the closure order; (2) a writ of mandamus to an appellate court for that jurisdiction; or (3) filing a separate lawsuit for an injunction or declaratory judgment to enforce the right of access.

Over time, the courts have concluded that intervention is the preferred method of challenging a sealing or closure order. "The courts have widely recognized that the *correct procedure for a nonparty to challenge a protective order is through intervention for that purpose.*" *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (emphasis added) (*citing Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783 (1st Cir.1988), *cert. denied*, 488 U.S. 1030, 109 S.Ct. 838, 102 L.Ed.2d 970 (1989)). *See also, In re Associated Press*, 162 F.3d 503 (7th Cir. 1998) (intervention is the "most appropriate procedural mechanism" for challenging closure orders); *Hertz v. Times-World Corp.*, 528 S.E.2d 458 (Va. 2000) (holding that the press *must* move to intervene for the limited purpose of challenging a closure order rather

than seek mandamus).

Intervention is the preferred method of challenging closure orders for two reasons. First, it leaves the closure decision in the hands of the judge who is most familiar with the case and who will be directly affected by the decision. *See, e.g., News American Division v. Maryland*, 447 A.2d 1264, 1271-72 (Md. App. 1982). Second, it is the most efficient and least disruptive means for challenging a closure order, as other courts are not prematurely brought in to regulate the dispute. *Id.* at 1272.

In other words, intervention allows the trial court to make a ruling based on the facts and evidence presented to it, and with the benefit of arguments presented by all interested persons, before another court steps in to review whether that closure or sealing order was valid.

C. Supreme Court rulings imply that intervention must be permitted for the limited purpose of challenging closure or sealing orders to meet constitutional standards of scrutiny.

Allowing intervention makes the most sense based on the long-established principle that a court may not enter a closure or sealing order without first providing the public and press with notice and an opportunity to be heard. *See* C. Thomas Dienes et al., *Newsgathering and the Law* § 2-3 (2d ed. 1999) (describing the necessary procedural steps that trial courts must take under the litany of U.S. Supreme Court right of access decisions). "[F]or a case-by-case approach to be meaningful, representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion.'" *Globe Newspapers Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) (*citing Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (Powell, J., *concurring*)). For

the "opportunity to be heard" to be meaningful, some notice must be provided before the trial court cuts off access to court proceedings or documents. *See, e.g., United States v. Cojab*, 996 F.2d 1404, 1408 (2d Cir. 1993) (holding that a hearing concerning closure cannot be held before the public has notice that the hearing will take place so that members of the public will have an opportunity to be heard).

Furthermore, courts are prohibited from entering sealing or closure orders unless there is evidence of harm to a compelling interest and no less restrictive means to avoid such harm. If a trial court wants to limit access to court proceedings or records, it must issue specific findings of fact that "closure is essential to preserve higher values [than the constitutional right of access] and is narrowly tailored to serve that interest." *Press- Enterprise Co. v. Superior Court (Press Enterprise II)*, 478 U.S. 1, 13-14 (1986). One reason that this procedural component is so important is so a reviewing court can determine whether the order was properly entered." *Press-Enterprise I*, 464 U.S. 501, 510 (1984). *See also, Dow Jones & Co. v. Kaye*, 90 F. Supp. 2d 1347 (S.D. Fla. 2000) (holding that order was improper where court failed to make findings based on evidence that a order was necessary); *NBC Subsidiary, Inc. v. Superior Court*, 980 P.2d 337 (Cal. 1999) (court must make rigorous findings before closure or sealing order is entered); *Montana ex rel. The Missoulian v. Montana Twenty-First Judicial District Court*, 933 P.2d 829 (Mont. 1997) (gag order improperly imposed where lower court failed to take any evidence or make any factual findings with regard to the restrictive orders); *Twohig v. Blackmer*, 918 P.2d 332 (N.M. 1996) (order may not be imposed until certain procedural requirements have been met); *Care and Protection of Edith & Others*, 659 N.E.2d 1174 (Mass. 1996) (any order must be based on detailed findings of fact and there must be a hearing to determine whether there is adequate evidence to support such findings); *State ex rel. National Broadcasting*

Company, Inc. v. Court of Common Pleas, 556 N.E.2d 1120 (Ohio 1990) (order cannot issue unless specific, on the record findings are made and representatives of the press and public are given an opportunity to be heard); *State ex rel. New Mexico Press Association v. Kaufman*, 265 P.2d 300 (N.M. 1982) (stating that restrictive orders were improper where judge failed to make any findings to support them); *State v. Clifford*, 733 N.E.2d 621 (Ohio App. 1999) (finding that a court must make a finding of necessity before closing a trial).

Thus, intervention allows the trial court to comply with the mandate that the public has an opportunity to be heard. Intervention also benefits the trial court, as all interested persons may discuss the potential harm, the evidence of such harm, and whether there are less restrictive alternatives, to ensure that any closure or sealing order is valid.

II. As a matter of policy, it is important for this Court to establish clear guidelines for the public to follow when seeking access to court records.

This Court should adopt a clear policy for both citizens and courts to understand how a concerned citizen may challenge a sealing order. *Amici* urge this Court to authorize the use of intervention for the limited purpose of challenging a sealing order.

In prior cases, this Court has noted the important policies behind a right of access to court proceedings and documents, and has ensured that those principles are not forsaken for expediency. *Amici* therefore urge this Court to continue to preserve the public's right of access to court proceedings and documents by permitting Petitioners to intervene in the underlying case and by establishing clear procedural guidelines for the courts and the public to follow when sealing orders are challenged.

CONCLUSION

Because clear procedural guidelines for challenging sealing orders need to be established, and because intervention is the best procedure to challenge such orders, *amici* respectfully urge this Court to permit petitioners to intervene in the underlying cases for the limited purpose of challenging the sealing orders.

Dated: June 1, 2001

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